United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-1702

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1702

ELENA CLASS, ET ALS. PLAINTIFFS-APPELLEES V. NICHOLAS NORTON, Successor to Henry C. White, individually and as Commissioner of the State of Connecticut Welfare Department, et al. DEFENDANT-APPELLANT	Appeal from the United States District Court for the District of Connecticut May 24, 1974 The Honorable M. Joseph Blumenfeld District Judge

BRIEF IN OPPOSITION

TO PLAINTIFF-APPELLEES'

MOTION TO DISMISS

Edmund C. Walsh
Assistant Attorney General
State of Connecticut
90 Brainard Road
Hartford, Connecticut 06114
203-566-7014

Attorney for Defendant-Appellant

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I. STATEMENT OF THE CASE

This action was originally brought as a class action by writ dated December 1, 1971. The plaintiffs were recipients of welfare assistance from the State Welfare Department of the State of Connecticut under the Aid to Families with Dependent Children (AFDC) pursuant to Title 42 U.S.C. Section 601-606. The plaintiffs were seeking injunctive and declaratory relief to compel the defendant-Welfare Commissioner to comply with the HEW requirement contained in 45 CFR Section 206.10(a) 3 and 6 which require that applications for AFDC be processed within 30 days from the date of application. Plaintiffs were also seeking that payments under the AFDC program be made effective from the date of application rather than, as required by the HEW regulation, from the date of approval of the application or 30 days from the date of application, whichever was sooner.

On June 16, 1972, by Memorandum of Decision, the District Court ordered the defendant-Commissioner to comply with applicable federal regulations by determining the eligibility of AFDC applicants within 30 days from the date of application for assistance. The Commissioner was further ordered to make assistance payments effective from

the date of application for assistance, whatever the date of determination of eligibility.

By Addendum to the Memorandum of Decision, filed on June 22, 1972, the defendant-Commissioner was further ordered to submit bi-monthly reports of the number of pending AFDC applications, including the number pending more than 30 days, which reports were to be filed until July, 1973.

On or about January 9, 1974, the plaintiffs moved that the defendant-Commissioner be adjudged in contempt of the District Court's orders for failure to comply with the Court orders of June 16 and June 22, 1972.

By a Ruling On Plaintiffs' Motion for Contempt and Other Relief, filed March 22, 1974, the District Court found that its orders of June 16 and 22, 1972, had not been effectively implemented, [R. 18, p. 2] but that the drastic remedies which plaintiffs seek--citation of the defendant Commissioner for contempt and issuance of an injunction preventing use of federal funds for the AFDC program in Connecticut--would be inappropriate in the circumstances of this case at this time.

The defendant was ordered, inter alia, within 15 days of the date of the order to take certain steps to properly implement the prior orders of the Court.

Those steps required, inter alia,

1) that the defendant-Commissioner make retroactive payments effective from the date of application to all AFDC beneficiaries who were receiving benefits from December 1, 1971, to June 1, 1972, and to submit reports to the Court as to the status of the processing of inactive and active cases covering the period from December 1, 1971 to June 1, 1972, and the number of persons to whom retroactive AFDC payments had been made by the welfare department, [R. 18, pp. 10, 11] and,

2) that "...within 15 days from the date of this order, the defendant Norton shall, as Commissioner of Welfare for the State of Connecticut, and in his individual capacity, pay costs and attorneys' fees for the prosecution of this motion in the amount of $1,000 to Fairfield County Legal Assistance Program, Inc., and Tolland-Windham Legal Assistance Program, Inc., plaintiffs' attorneys, such amount to be divided equally between the two legal services programs." [R. 18, p. 15]

ARGUMENT

The plaintiff-Appellees have filed a Motion to Dismiss this appeal on the grounds that the appeal is "totally frivolous."

In appealing from the District Court's Ruling on Plaintiff's Motion for Contempt and Other Relief, dated March 22, 1974, [R. 18] the Appellant will raise the following issues:

1. Whether or not it was error for the District Court to order the Defendant-Commissioner to make retroactive Welfare assistance payments to Plaintiff-AFDC recipient. in light of the decision of the United States Supreme Court in the case of Edelman v. Jordan.

2. Whether or not it was error for the District Court to order the Defendant-Commissioner to pay $1,000 as attorneys' fees to counsel for the plaintiffs, also in light of the case of Edelman v. Jordan.

3. Whether or not it was error for the District Court to order the Defendant-Commissioner to pay attorneys' fees to plaintiffs' counsel in his individual capacity as well as in his official capacity.

4. Whether or not it was error for the District Court to hear the plaintiffs' Motion for Contempt, which was filed January 4, 1974, prior to ruling on defendants' Motion for Relief from Judgment dated August 30, 1973, which was argued before the District Court on September 13, 1973.

5. Whether or not it was error for the District Court to issue a new directive to Welfare Department personnel regarding retroactive payments in processing of AFDC applications, the specific and detailed content of which directive was dictated by the District Court.

6. Whether or not it was error for the District Court to include in the aforesaid new directive, certain provisions which were in conflict with regulations issued by the Department of Health, Education and Welfare covering the same subject matter.

ISSUES

1. Whether or not it was error for the District Court to order the Defendant-Commissioner to make retroactive Welfare assistance payments to Plaintiff-AFDC recipient, in light of the decision of the United States Supreme Court in the case of Edelman v. Jordan.

The defendant-appellant in presenting this issue is relying on the recent United States Supreme Court decision in Edelman v. Jordan, U.S. , 39 LEd2d 662, (March 25, 1964). In that case, the Supreme Court reversed that portion of the Court of Appeals decision

which had affirmed the District Court's order that retroactive benefits be paid to AABD welfare recipients by the Illinois state officials. The Court held (at p. 680) that: "...a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, Ex Parte Young, supra, and may not include a retroactive award which requires the payment of funds from the state treasury, Ford Motor Co. v. Department of Treasury, supra."

The Court, in its opinion, traced the historical basis of the Eleventh Amendment since its ratification in 1798. At p. 672, the Court stated: "...[W]hile the Amendment by its terms does not bar suits against a state by its own citizens, this Court has consistently held [emphasis added] that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. Hans v. Louisiana, 134 U.S. 1, 33 LEd 842, 10 S. Ct. 504 (1890); Duhne v. New Jersey, 251 U.S. 311, 64 LEd 280, 40 S. Ct. 154 (1920); Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 88 LEd 1121, 64 S. Ct. 873 (1944); Parden v. Terminal R. Co., 377 U.S. 184, 12 LEd2d 233, 84 S. Ct. 1207 (1964); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 36 LEd2d 251, 93 S. Ct. 1614 (1973) ..."

The Court then went on to state (p. 672) "...[I]t is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." [citing] Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 89 LEd 389, 65 S. Ct. 347 (1945).

The Court [p. 673] quoted, with approval, Judge Mc Gowan's opinion in Rothstein v. Wyman, 467 F. 2d 226 (CA2 1972) cert. denied, 411 U.S. 921, 36 LEd2d 315, 93 S. Ct. 1552 (1973), and at p. 674 as follows: "...[I]t is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to run afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force."

The Court then stated that it agreed with Judge Mc Gowan's observations. It stated further that retroactive award, by the lower Court, resembled "far more closely the monetary award against the State itself, Ford Motor

Co. v. Department of Treasury, supra, than it does the prospective injunctive relief awarded in Ex Parte Young."

At p. 676 the Court commented: "[W]ere we to uphold this portion of the District Court's decree [the awarding of retroactive payments] we would be obligated to overrule the Court's holding in Ford Motor Co. v. Department of Treasury, supra...Yet this Court had no hesitation in holding [in that case] that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We read a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case."

In Edelman, the Court of Appeals had expressed the view that its holding on the Eleventh Amendment issue was supported by the Supreme Court's decision in Department of Employment v. United States, 385 U.S. 355, 17 LEd2d 414, 87 S. Ct. 464 (1966). That case had cited Monaco v. Mississippi, 292 U.S. 313, 78 LEd 1282, 54 S. Ct. 745 (1934). In commenting on the Court of Appeals view, the Supreme Court [p. 676] stated: "[I]n view of Mr. Chief Justice Hughes' vigorous reaffirmation in Monaco of the principles of the Eleventh Amendment and sovereign immu-

nity, we think it unlikely that the Court in Department of Employment v. United States, in citing Ex Parte Young, as well as Monaco, intended to foreshadow a departure from the rule to which, we adhere today." [emphasis added]

It is apparent that the Supreme Court in Edelman, took great pains to authenticate, with the numerous cases it cited and discussed, the assertion in its opinion [at p. 672] that "...this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State..." [emphasis added]

The defendant believes that the Court was saying, in effect, that, at least since 1798, when the Eleventh Amendment was ratified, that the federal courts have never had the power, because of the immunity conferred by the Eleventh Amendment, to make such an award against a state as the retroactive benefits awarded in the Edelman case, and also in the instant case.

The District Court in this action has held [S. 2, p. 9, 10] that Edelman should not be applied retroactively. When referring to the ruling of the Court of Appeals that under the tests of Chevron Oil Co. v. Huson, 404 U.S. 97, 30 LEd2d 296, 92 S. Ct. 349 (1971), the contention of the petitioner was unsound and that the ruling of the

District Court was correct in holding that its decision was to be applied retroactively back to July 1, 1968, the Supreme Court said [at p. 670, n.7]: "In light of our disposition of this case on the Eleventh Amendment issue we see no reason to address this contention." [emphasis added]

The defendant believes that the Court felt it could not discuss its decision on Eleventh Amendment immunity in terms of whether or not it was to be applied retroactively, since it had, in its decision, gone to such pains to demonstrate that "this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." [Edelman, supra, p. 672]

Had the Supreme Court held the decision either was or was not to be applied retroactively, the inescapable inference to be drawn from such a ruling was that, for some period of time at least, the prior decision of the Supreme Court had acted to suspend the immunity conferred upon the States from suit under the Eleventh Amendment. This, of course, the Supreme Court has no power to do.

The appellant herein does not believe it to be "totally frivilous" to ask this Court to review this question on appeal.

2. Whether or not it was error for the District Court to order the Defendant-Commissioner to pay $1,000 as attorneys' fees to counsel for the plaintiffs, also in light of the case of Edelman v. Jordan.

In its Ruling On Plaintiffs' Motion For Contempt And Other Relief [R. 18, p. 15], the District Court ordered, inter alia, that: "Accordingly, within 15 days from the date of this order, the defendant Norton shall, as Commissioner of Welfare for the State of Connecticut, and in his individual capacity, pay costs and attorneys' fees for the prosecution of this motion in the amount of $1,000 to Fairfield County Legal Services, Inc., and Tolland-Windham Legal Assistance Program, Inc., plaintiffs' attorneys, such amount to be divided equally between the two legal services programs."

The District Court, in its Ruling On The Application For A Partial Stay Order [S. 2, p. 8] held that such a payment was not barred by the Eleventh Amendment as enunciated in Edelman. The Court, in support of its ruling, cited the recent case of Jordan v. Fusari, Dkt. No. 73-2364 (2d Cir., April 29, 1974). Defendant believes that the factual situation in that case is clearly distinguishable from the instant case.

In Fusari, the District Court awarded attorneys' fees to plaintiffs attorneys in a case in which the defendant was the Commissioner of Labor and Administrator of Unemployment Compensation Act of the State of Connecticut. But in that case, the attorneys' fees awarded by the Court were to be a percentage of the awards of the plaintiff class, and were not to be paid from funds out of the state treasury.

In addition, the Court found that a settlement of the claim for back unemployment insurance benefits was a waiver by the defendant of any Eleventh Amendment defense as to those benefits. Jordan v. Fusari, supra, slip opinion, p. 3067.

However, even had Fusari, supra, not had these distinguishing features, defendant believes that the award of attorneys' fees against a state official was barred by the Eleventh Amendment under the Edelman decision, and that such an award is not one which has "...[S]uch an ancillary effect on the state treasury [as is] a permissible and often inevitable consequence of the principle announced in Ex parte Young, supra." Edelman v. Jordan, supra, at p. 675.

3. Whether or not it was error for the District Court to order the Defendant-Commissioner to pay attorneys' fees to plaintiffs' counsel in his individual capacity as well as in his official capacity.

In addition to ordering the defendant-Commissioner of Welfare to pay costs and $1,000 in attorneys' fees to the attorneys for the plaintiffs in his capacity as Commissioner of Welfare of the State of Connecticut, the District Court also ordered that defendant pay these costs and attorneys' fees in his individual capacity.[R.18,p.15]

In Westberry v. Fisher, 309 F. Supp. 12 (1970), it was held that the Commissioner and administrative personnel of the Maine State Department of Health and Welfare were not personally liable under the civil rights statute [42 U.S.C. Sec. 1983] for damages to ADC recipients to whom were applied the Department's unconstitutional maximum budget and maximum grant regulations, where there was no abuse of discretionary atuthority, malice or ill-will on the part of defendants, and the Commissioner acted within the scope of his authority in respect to regulations and within his rule-making power.

To the same effect is Jordan v. Weaver, 472 F.2d 985 (1973). In that case the court said at p. 999: "[A]s in Westberry v. Fisher [citation omitted], the record is utterly devoid of any proof of abuse of discretionary authority,

malice, or ill-will on the part of defendant Swank. In our view, the district judge did not abuse his discretion in denying punitive damages."

In the instant case there was no finding by the District Court that the defendant-Commissioner had acted out of malice or ill-will; nor that there was an abuse of discretionary authority; nor that defendant had acted beyond the scope of his authority. On the contrary, the District found [R.18,p.4] that, "[T]here appear to be several factors contributing to the ineffective implementation of this Court's orders. At the hearing on this motion...[welfare department officials] both indicated in their testimony that delays in paying retroactive benefits and in processing pending applications could be traced to a lack of sufficient numbers of office personnel."

The District Court went on to say [R. 18,p.5],"[A] second factor contributing to the ineffective implementation of this Court's orders appears to be specific procedures utilized by local offices of the State Welfare Department in processing applications for assistance, a factor which may be attributed to a misunderstanding of the requirements of this Court's orders on the part of Welfare Department personnel."

The District Court further stated [R.18,p.10], "[A]ltho the failure of compliance with this Court's prior orders on

the part of the Department appears to have been substantial, I have concluded that the drastic remedies which plaintiffs seek--citation for contempt and the issuance of an injunction preventing use of federal funds for the AFDC program in Connecticut--would be inappropriate in the circumstances of this case at this time. [citations omitted] It appears that much of the failure of compliance may have been the result of good faith attempts on the part of Department personnel to implement policies which were not sufficiently clarified by Department administrators."

In view of the foregoing statements by the District Court, the defendant-Commissioner is at a loss to understand why the Court imposed upon him [R.18,p.15] an order to pay costs and $1,000 in attorneys' fees to plaintiffs' attorneys, "as Commissioner of Welfare for the State of Connecticut, and in his individual capacity ..."

Defendant believes this is a departure from the prior holdings of the federal courts on this question enunciated in such cases as Westberry v. Fisher, supra, and Jordan v. Swank, supra, and that it is tantamount to a finding of absolute liability on the part of public administrative officials acting in good faith in the discharge of their duties. Were the federal courts to follow the District Court's ruling in this case, on this question, the limited

liability concept announced in Westberry v. Fisher, supra, would be abolished.

The defendant most earnestly believes he is entitled to have this question reviewed by the Court of Appeals.

4. Whether or not it was error for the District Court to hear the plaintiffs' Motion for Contempt, which was filed January 4, 1974, prior to ruling on defendants' Motion for Relief from Judgment dated August 30, 1973, which was argued before the District Court on September 13, 1973.

By publication in the 38 Fed. Register 22009, dated August 15, 1973, the Department of Health, Education and Welfare (HEW) issued certain revisions of its regulations contained in 45 C.F.R. One of the revised regulations was the one contained in 45 C.F.R. 206.10. This was the HEW regulation which, prior to this revision, provided, inter alia, that determination of eligibility regarding applicants for AFDC benefits be made within 30 days from the date of application for assistance. In its Judgment [R.11, p.1] the District Court ordered the defendants to comply with 45 C.F.R. Sec. 206.10(a)(2) and (3) with respect to the determination of eligibility for welfare assistance under the state program of Aid to Families with Dependent Children on penalty of withdrawal of federal funds for the said AFDC program in Connecticut.

The revised regulation, 45 C.F.R. 206.10(a)(3)(i), as promulgated on August 15, 1973, as aforesaid, allows 45 days (instead of the former 30 days) in which to make such determination of eligibility.

The appellant herein, filed a Motion for Relief from Judgment [S.2] on September 4, 1973. This motion was argued before the District Court on or about September 13, 1973. But no decision was rendered on this motion by the District Court until May 13, 1974. The plaintiff, in filing this motion for relief, believed that it would be readily granted by the Court, since the motion was, in essence, merely a request to be allowed to comply with the revised HEW time standards, and since the Court had originally ordered [R.11] the State to comply with the then applicable [June, 1973] HEW regulations.

On or about January 4, 1974, the plaintiffs filed a Motion for Contempt and Other Relief [R. 14] which was heard on January 9 and 10, 1974, and which resulted in the District Court Ruling on Plaintiffs' Motion for Contempt and Other Relief [R. 18]. In that Ruling, the defendant-Commissioner was not found to be in contempt, but the District Court did find "substantial non-compliance" with the Court's orders of June, 1972, [R.9,10,11] particularly with respect to the processing of applications within 30 days.

The appellant contends that it was error for the District

Court to rule on the plaintiffs' Contempt motion, prior to ruling on the defendant's Motion for Relief from Judgment, which had been argued some four months prior to the hearing on contempt, for the following reasons:

1) In the subsequent Contempt motion, the District Court judged the performance of the defendant-Commissioner, with respect to processing AFDC applications, on a standard [30 days vs. 45 days] which was much more severe than was required by the then-current HEW regulations. Since the District Court, in making its original order, based its reason therefore on a lack of compliance with HEW's regulations, it can only be concluded that the District Court was relying on the acknowledged expertise of the Agency chosen by Congress to administer this program.

Altho the District Court subsequently ruled on May 13, 1974, [S.2,p.5] that the "changes in the HEW regulations do not constitute the 'extraordinary circumstances' required for relief under Rule 60(b)(6)," the question of whether the defendant-Commissioner should be allowed 30 days or 45 days in which to process AFDC applications goes to the very heart of the question of compliance or non-compliance with the Court's order.

HEW,after extensive hearing, and after the receipt of many comments in reply to its invitation to submit such comments, decided that 30 days was an insufficient time in

which to require the states to process AFDC applications. Accordingly, in the exercise of its expertise in this matter, it revised the regulation so as to allow 45 days. Had the defendant-Commissioner been granted the relief requested from the District Court in September, 1973, he would have been allowed 45 days to process the applications thereafter. A contempt motion, in that event, might never have been brought in January, 1974, and, even if it had, the longer time period that would have been afforded for the processing of AFDC applications might well have resulted in an entirely different disposition by the District Court. Certainly, he would have been judged under a much less severe time frame in the evaluation of his performance.

2) In addition to the foregoing, the failure of the District Court to rule on the Motion for Relief from Judgment, until eight months after the motion was argued, served to deprive the defendant-Commissioner of the opportunity to appeal an adverse ruling on his motion for relief to the Court of Appeals.

The defendant contends, therefore, that he was doubly prejudiced by the failure of the District Court to rule on his Motion for Relief from Judgment, and believes he is entitled to have this question reviewed by this Court.

5. Whether or not it was error for the District Court to issue a new directive to Welfare Department personnel regarding retroactive payments in processing of AFDC applications, the specific and detailed content of which directive was dictated by the District Court.

The Appellant believes it was error for the District Court to affirmatively set forth the detailed contents of a Welfare Department directive, and to thereupon order that such a directive be promulgated as official policy of the Welfare Department. This, it appears, is an unwarranted intrusion by the judiciary into the administrative realm.

6. Whether or not it was error for the District Court to include in the aforesaid new directive, certain provisions which were in conflict with regulations issued by the Department of Health, Education and Welfare covering the same subject matter.

For the District Court to issue in the aforesaid directive provisions which were in conflict with HEW regulations is also an unwarranted intrusion by the judiciary into the administrative realm, as well as an assumption by the District Court into the province of administration which Congress has delegated exclusively to the administrative agency.

CONCLUSION

For the foregoing reasons the Appellant believes the Court of Appeals should review the decision of the District Court, and should not dismiss the appeal.

RESPECTFULLY SUBMITTED,

ROBERT K. KILLIAN
ATTORNEY GENERAL

BY Edmund C. Walsh
EDMUND C. WALSH
ASSISTANT ATTORNEY GENERAL
90 Brainard Road
Hartford, Connecticut 06114

Attorney for the Defendant-
Appellant

CERTIFICATION

I hereby certify that I served a copy of the foregoing Brief in Opposition to Plaintiff-Appellees' Motion to Dismiss by depositing the same in the mails on the 24th day of May, 1974, to the following:

James C. Sturdevant, Esquire
Tolland-Windham Legal Assistance Program
P. O. Box 358
Rockville, Connecticut

Marilyn K. Katz, Esquire
Fairfield County Legal Services
412 East Main Street
Bridgeport, Connecticut

Edmund C. Walsh

EDMUND C. WALSH
ASSISTANT ATTORNEY GENERAL

Attorney for the Defendant-Appellant